

EMPLOYER RISK ALERT: The Independent Contractor Conundrum

My plan for this month was to share all the important and relevant information contained in our New York State budget. But I can't. It was due this week and they don't even have an agreement on how much there is to spend this year.

So, I'm going to talk about an issue that should have been in the budget. Or should be addressed by legislation. (Both approaches have been flirted with over the years but nothing happens.) Meanwhile, the lack of clarity costs employers millions. We are talking about the misclassification of independent contractors.

On more than one occasion an employer has told me that they "chose" to "put" certain people on a 1099 instead of a W2. This is a common, big, and potentially very expensive mistake.

How to classify a worker is not optional. It is a legal standard established by multiple variables. There are both federal and state considerations; and, here in New York, that standard is guarded by worker advocates and aggressively enforced by authorities. Someone cannot choose to be an independent contractor. They are either a separate company, in business for themselves and providing an advertised service, or they are not.

The real problem, though, is the number of different standards that employers are expected to navigate. They must comply with mandates imposed by the governing agencies while keeping up with each's own particular definitions and interpretations.

What does this mean?

Each agency has its own jurisdiction and its own oversight. While an employer may be complying with the Workers' Compensation Board standard for independent contractors, e.g., they may not be in compliance with the Unemployment Insurance Division. So, when the agency conducts an audit, they can

find years of contributions owed for people believed to be legitimate contractors; or that overtime is owed to people believed to work for someone else, and an employer cannot rely on any one agency's guidance or findings.

FEDERAL STANDARDS

On the federal level, the United States Department of Labor (USDOL), the Equal Employment Opportunity Commission (EEOC), and the Internal Revenue Service (IRS) all deal with independent contractors. However, while the IRS may allow an individual to call themselves a business and deduct expenses, DOL may find that they are due overtime. There is no alignment of definition across the laws the agencies enforce.

What does this mean?

It means budgets are unpredictable because wage rate changes could be imposed mid-project. It means that a business may find it has liability for the behavior of a person it has never met nor intended to employ. It means the premise that regulatory agencies are supposed to have a "regular" set of rules a business can follow, is so far a pipe dream.

NEW YORK RULES

New York compounds the problem. On the state level, we have at least four agencies interpreting and applying the "misclassification" rules. The New York State Department of Labor ("NYS-DOL"), New York State Tax and Finance ("Tax"), New York State Division on Human Rights ("DHR"), and New York State Workers' Compensation Board all have teams of investigators who have free reign to decide what factors to consider in their analysis.

What does this mean?

It means, e.g., that a driver may not be entitled to UI but that they must be covered by workers' compensation insurance. It means clients who "put" people on 1099s suddenly owe millions in UI contributions because those contractors were legally employees.

THE CITY

To help protect workers in business for themselves, the New York City "Freelance Isn't Free Act" (FIFA), took effect in May 2017. Amongst its requirements are a written contract with anyone hiring a freelancer. The agreement must include a scope of work and payment schedule. The law also grants many of the same rights as employees, including statutory damages, civil penalties, double damages, and injunctive relief.

THE STATE

On August 28, 2024, a statewide version of FIFA took effect. It was added to the General Business Law and requires anyone that engages an independent contractor to execute a written contract providing terms for payment, and certain record-keeping.

But guess what? Following these laws will not guarantee compliance. USDOL, NYS DOL, the Attorney General, Tax and Finance, the IRS...they can all still find an employment relationship and impose all the costs and penalties that go with.

WHAT DOES THIS MEAN?

It's time to streamline the New York licensing and regulatory systems. It's hard enough to do business in this City.

Create a portal. Put everything from how to get licensed to how to wind down your LLC and all the rules in between, in one place. Align the definitions across the statutes. Standardize the interpretations and processes across agencies.

There are 200,000 business owners in this city who need to focus on making payroll over playing whack-a-mole with "regulators".

This article is for informational purposes only and is not legal advice.

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